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Kelsey Walsh

Indiana University Maurer School of Law, kelmwals@indiana.edu

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NOTE

Food Insecurity & The French Solution to an American Epidemic

Kelsey Walsh*

INTRODUCTION

In a nation that touts its abundance and is globally recognized as having one of the highest rates of obesity among its citizens,¹ hunger and food insecurity is an often overlooked national crisis in the United States. In 2010, the number of food-insecure individuals was a staggering forty-nine million people.² One explanation as to why measures taken to reduce this number have been lacking is that food insecurity disproportionately affects marginalized communities.³ Unsurprisingly, food insecurity affects adults and children in lower socioeconomic classes most severely. However, poverty level is not the only determinative factor in identifying food-insecure homes.⁴ Other intersectional populations at risk include people of color, people with low levels of education, households with many children, and households headed by single mothers.⁵ In an article that calls for the United States to officially recognize access to food as a fundamental right (the United States is only one of two countries that does not recognize this as a fundamental right), Mariana Chilton and Jenny Rabinowich reflect that “black and Latino families experience food insecurity at rates that are three times higher than those of white families. These disparities highlight the fact that hunger is not simply an issue of food, but a symptom of systemic human rights violations.”⁶ The idea of “food oppression,” or using current food policies and practices to underserve marginalized populations, is relatively novel and arises from a similar “fundamental right” characterization of food, but it is not

* Articles Editor, Indiana Journal of Law and Social Equality; J.D. / M.P.A. Candidate 2019, Indiana University. The author wishes to thank Professor Eric Metzler with the Kelley School of Business for his support and feedback on this Note.

1 See *The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2228rank.html> (last visited Jan. 14, 2017).

2 Mariana Chilton & Jenny Rabinowich, *Ending Childhood Hunger in America*, 37 HUM. RTS. 14, 14 (2010).

3 See *id.*; see also Andrea Freeman, *The Unbearable Whiteness of Milk: Food Oppression and the USDA*, 3 U.C. IRVINE L. REV. 1251, 1254 (2013).

4 John T. Cook & Deborah A. Frank, *Food Security, Poverty, and Human Development in the United States*, 113 ANNALS OF THE NEW YORK ACAD. OF SCI. 193, 195 (2008); Vanessa Wight, Neeraj Kaushal, Jane Waldfogel, & Irv Garfinkel, *Understanding the Link between Poverty and Food Insecurity in Children: Does the Definition of Poverty Matter?*, 20 J. CHILDREN AND POVERTY 1, 8 (2014).

5 Jean Anding, Lacye Osborn & Mary Anne Gorman, *Study Finds Food Insecurity in Households Receiving WIC Benefits*, 98 J. FAM. & CONSUMER SCI. 33, 34 (2006).

6 Chilton & Rabinowich, *supra* note 2.

frequently the focus of social justice advocates.⁷ Instead, efforts are concentrated on more visible national crises like mass incarceration.⁸ While both of these issues affect overlapping demographic groups, food insecurity, more than mass incarceration, is a reality often introduced early in life and one that remains a constant daily companion: “[h]ouseholds with children experience rates of food insecurity that are double those without children.”⁹ For myriad reasons, intersectional food activism has not been a prominently featured cause for social justice movements,¹⁰ despite the damaging effect food insecurity and hunger have on the development and success of the people suffering from them.¹¹

The United States Department of Agriculture categorizes degrees of food security on a spectrum, ranging from “very low food security” (little regular access to food) to “high food security” (few to no barriers to food access).¹² For the purposes of this Note, it is important to understand the distinction between two categories of food insecurity—low security and very low security—to ensure proposed solutions to food insecurity through food waste management adequately respond to the needs of citizens in both of these categories. Low food security does not necessarily implicate hunger and instead focuses on the nutritional value of the food accessible to people in this group, based on quality, variety, or desirability of the food.¹³ People in this group may be receiving enough food to eat based on recommended caloric intake measures but are not receiving food that meets nutritional needs for a healthy diet.¹⁴ The very low food security category indicates “disrupted eating patterns and reduced food intake.”¹⁵ This category’s old label was “food insecurity with hunger,” which suggests both limited access to nutritionally rich foods, as seen in the low food security category, as well as limited access to an amount of food sufficient to meet basic caloric requirements.¹⁶ When addressing the problem of food insecurity through waste reduction, it is important to recognize and promote solutions that ameliorate issues for both of these categories.

7 Freeman, *supra* note 3, at 1254.

8 *Id.* at 1275–76 (Freeman is able to illustrate similarities between mass incarceration and food oppression in terms of their disproportionate effect on marginalized communities: “Mass incarceration and food oppression . . . are both forms of social control that successfully reduce the strength and numbers of besieged communities while placing the blame for this diminution squarely on the individuals. There are a number of similarities between these two sites of race and class oppression. First, they are analogous in scope, affecting millions of low-income African Americans and Latina/os. Second, they lead to the physical removal of black and brown bodies from public spaces, rendering them invisible to the mainstream Third, they impose severe physical restrictions, as well as limitations on political and social participation, on their subjects Fourth, those affected become devalued or denigrated due to the stigma of criminality . . . or, for the sick, the perception that they are literally unfit for society . . .”).

9 Chilton & Rabinowich, *supra* note 2, at 14.

10 Freeman, *supra* note 3, at 1275.

11 See generally Cook & Frank, *supra* note 4.

12 *Definitions of Food Security*, USDA, <https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/definitions-of-food-security.aspx> (last visited Jan. 13, 2017).

13 *Id.*

14 See *id.*

15 *Id.*

16 See *id.*

Part I of this Note details the state of food insecurity and hunger in the United States and expounds the domino effect these issues have on society. Part II identifies existing solutions to hunger and food insecurity, and examines why those are not adequately addressing the issues. Part III analyzes the successes and failures of the French legislation passed in 2015 that puts the onus of food waste on food retailers. Part IV addresses the viability of such a program in the United States and voices policy considerations. This Note ultimately takes the position that a law similar to the French legislation could and should work in the United States.

I. FOOD INSECURITY, FOOD WASTE, AND THE IMPACT OF HUNGER ON SOCIETY

Food insecurity and waste are two sides of the same coin. Research done in 2012 regarding food waste in developed countries determined that in 2008, 57.2 million metric tons of food produced in the United States went unconsumed.¹⁷ That number accounts for 29% of all of the available food supply for that year.¹⁸ Of that 29%, 10% was lost at the retail level,¹⁹ meaning that food items that made it onto the shelves of grocery stores went unsold or were rejected for any number of reasons.²⁰ Overproduction and underselling of post-production foods necessitates dumping by retailers to maintain a reasonable level of stocked goods.²¹ Imperfect produce, dented cans, and poor storage methods also contribute to retail-level food waste.²² Food waste and poor distribution are direct causes of food insecurity. There is no food shortage in the United States (or the world, for that matter—1.3 billion metric tons of food produced globally go uneaten per year);²³ in fact, food suppliers are producing more than enough to feed the population.²⁴ Momentarily disregarding the different sectors responsible for food waste and instead looking at the big picture, simply stated, a surplus of food production should logically mean that all people meant to be fed by a particular provider are food secure. This is clearly not the case, so the breakdown must be occurring, at least in part, due to consumable food waste.

Food waste has obvious and marked environmental and economic impacts. Economic and natural resources poured into producing food that will be discarded before its intended use are resources misused and diverted from other ventures that may have used them to actually fulfill the purpose for which they exist. The labor, energy, water, chemicals, and cultivable land that are dedicated to food production and consumption industries are wasted when good food goes uneaten and

17 Jean C. Buzby & Jeffrey Hyman, *Total and Per Capita Value of Food Loss in the United States*, 37 FOOD POL'Y. 561, 564 (2012).

18 *Id.*

19 *Id.*

20 *See id.*

21 *Id.* at 563.

22 *Id.*

23 *Id.* at 561.

24 Jessica A. Cohen, *Ten Years of Leftovers with Many Hungry Still Left Over: A Decade of Donations Under the Bill Emerson Good Samaritan Food Donation Act*, 5 SEATTLE J. SOC. JUST. 455, 455 (2006).

undistributed.²⁵ The EPA estimated that food waste alone comprised 14% of municipal solid waste in the United States in 2008 and that “less than 3% of food waste was recovered and recycled in 2009, with the remainder going to landfills or incinerators.”²⁶ It cost the United States \$1.3 billion to landfill the wasted food from 2008.²⁷ The same report looks at the impact of food waste on the environment and states that food waste “now accounts for more than one quarter of [U.S.] total freshwater consumption per year.”²⁸ While food production is inevitably linked to negative environmental externalities such as air and water pollution, greenhouse gas emissions, and irreparable damage to arable land,²⁹ it is only in food wasted that those externalities cease to have a counterbalancing positive impact.

Food insecurity can lead to hunger, malnutrition, and disordered eating, which can result in a ripple effect of consequences for the persons affected.³⁰ It can be shown that hunger and food insecurity play a role in developing a cascade of pervasive and often lifelong social and health issues.³¹ Many studies have shown a relationship between food insecurity and “disrupted household dynamics, impaired learning and reduced productivity among adults, poor behavioral and academic performance in children, increased health costs, and increased obesity risks.”³² In looking at these effects, a logical connection can be made between food insecurity and seemingly unrelated national crises; hungry and underperforming students are less likely to go to college than their food-secure counterparts.³³ As previously mentioned in this Note, the populations most affected by hunger and food insecurity are predominantly made up of marginalized groups,³⁴ so the natural consequence is that the divisions between class, race, and higher education are reinforced and perpetuated. Most of these divisions are underscored and perpetuated due to inequalities experienced during childhood, and it has been shown that hunger and malnutrition have a particularly great effect on children:³⁵

Food insecurity among children is associated with fair and poor child health, with high hospitalization rates, and with truncated social, emotional, and cognitive development. Among school-age kids, food

25 Buzby & Hyman, *supra* note 17, at 562.

26 *Id.*

27 *Id.*

28 Kevin D. Hall, Juen Guo, Michael Dore & Carson C. Chow, *The Progressive Increase of Food Waste in America and Its Environmental Impact*, 4 PLOS ONE, Nov. 2009, at 1.

29 Buzby & Hyman, *supra* note 17, at 562.

30 Cohen, *supra* note 24, at 462.

31 *Id.*

32 *Id.*

33 See James Haley, Note, *The Legal Guide to the Bill Emerson Good Samaritan Food Donation Act*, ARK. L. NOTES 1448, 1451 (2013).

34 See Chilton & Rabinowich, *supra* note 2, at 14; Freeman, *supra* note 3, at 1254.

35 USDA & EPA, Pub. No. EPA 530-R-99-040, WASTE NOT, WANT NOT: FEEDING THE HUNGRY AND REDUCING SOLID WASTE THROUGH FOOD RECOVERY 5 (1999), <https://nepis.epa.gov> (search “Waste Note, Want Not: Feeding the Hungry and Reducing Solid Waste Through Food Recovery,” choose fourth result).

insecurity affects their school performance, their math and reading test scores, and their ability to pay attention and behave; among teenagers, it is associated with suicidal ideation and depression.³⁶

Children and young adults exhibiting poor behavioral performance and for whom disrupted household dynamics are present are more likely than those not experiencing these problems to have trouble succeeding in adulthood.³⁷

The social effects of hunger are staggering and ultimately help foster the cyclical natures of poverty and crime. In a 2005 U.S. Mayors/Sodexo report, a survey of twenty-four cities reported a relationship between hunger and unemployment, high housing costs, medical and healthcare costs, mental health problems, substance abuse problems, transportation costs, childcare costs, and lack of education.³⁸ Individuals faced with food insecurity have very little choice when deciding what and when to eat and, due to a pervasive lack of long- and short-term resources, are not in the best position to strategically address and improve their nutritional intake. Despite a pervasive collective sense that those in need are those best suited to solve their own problems (and any shortcoming in improving life station is tantamount to personal failure),³⁹ the reality is that the American food distribution system is systematically stacked against marginalized communities. For a food insecure family to change its buying and eating habits to meet what is conventionally understood to be nutritionally balanced and calorically sufficient, drastic changes would likely need to occur in the areas of family finances, time management, and nutritional health education.

Poor food distribution and access mechanisms contribute to waste and food insecurity, and as the majority of people affected by these bureaucratic failings belong to one or more minority groups, inaction and passivity communicate more about government priorities than perhaps intended. Andrea Freeman introduces the idea of “food oppression” in her article for U.C. Irvine Law Review, postulating that it arises from “institutionalized, food-related policies and practices that undermine the physical strength and survival of socially marginalized groups.”⁴⁰ In particular, certain policies and strategies pursued by the government in distributing food and food or foodstuff subsidies tend to exacerbate existing inequities in the fabric of American life. For example, regionally-based initiatives pursued as a result of partisan political pressure, despite being facially neutral with regard to effects on marginalized communities, generally perpetuate and widen gaps in equality because

36 Chilton & Rabinowich, *supra* note 2, at 14.

37 See Heather Sandstrom & Sandra Huerta, *The Negative Effects of Instability on Child Development: A Research Synthesis* (Urban Inst., D.C.), Sep. 2013, at 40.

38 Cohen, *supra* note 24, at 459–60.

39 See Freeman, *supra* note 3, at 1253 (There is “powerful rhetoric [in the United States] regarding personal choice . . . [that] attributes ill health to individual weakness, regardless of the very real constraints that shape nutritional intake, particularly in low-income, urban communities.”).

40 *Id.* at 1254.

they address only a portion of the problem and often don't recognize the existing structural inequities that contributed to the issue in the first place.⁴¹

Not nearly enough has been done to resolve the issue of food insecurity. Food insecurity is not an unavoidable reality that accompanies growing modern societies.⁴² According to Chilton and Rabinowich, "[T]he United States produces enough food to feed every one of its citizens. Food insecurity is completely man-made and entirely preventable."⁴³ One such method of prevention is to reduce and redistribute the incredible amount of edible food wasted. The environmental, economic, and social impacts that food waste, insecurity, and hunger have on modern America are the pervasive drivers behind the creation of many of the food-related governmental assistance programs and public outcry for assistance reform.

II. MEASURES IN PLACE AIMED AT ADDRESSING FOOD INSECURITY IN THE UNITED STATES

The United States is not entirely blind to the plight of food insecure and underfed Americans. A study by the United States Department of Agriculture's Economic Research Service reported that 15.8 million households (or 12.7 percent of American households) were food insecure in 2015.⁴⁴ Of that population, 6.3 million households were experiencing very low food security.⁴⁵ While 12.7% is statistically significantly lower than the 14% reported in 2014, these statistics are still higher than the pre-recession rate of food insecurity measured in 2007 at 11%.⁴⁶ Food insecurity is not by any stretch of the imagination a new problem⁴⁷ in developed countries.⁴⁸ Naturally, then, there have been a number of programs created and pieces of legislation passed aimed at addressing this issue, and while these programs and bills have seen some successes, they remain woefully inadequate in attempting to repair the damaged system.

Currently, there are eight federal food assistance programs: The Supplemental Nutrition Assistance Program (SNAP), The Emergency Food Assistance Program (TEFAP), The Commodity Supplemental Food Program (CSFP), The Child and Adult Care Food Program (CACFP), The National School Lunch Program (NSLP), The School Breakfast Program (SBP), The Summer Food Service Program (SFSP), and The Special Supplemental Nutrition Program for Women, Infants, and Children

41 *Id.* at 1256–57.

42 Chilton & Rabinowich, *supra* note 2, at 14.

43 *Id.*

44 ALISHA COLEMAN-JENSEN, MATTHEW P. RABBITT, CHRISTIAN A. GREGORY & ANITA SINGH, USDA, HOUSEHOLD FOOD SECURITY IN THE UNITED STATES IN 2015, at 6 (2016).

45 *Id.*

46 *Id.*

47 See Amy Dorsch, *Food Stamps in America: How an Octogenarian Program Can Still Meet the Country's Needs*, 52 U. LOUISVILLE L. REV. 199, 200 (2013).

48 See generally ALISHA COLEMAN-JENSEN ET AL., *supra* note 44.

(WIC).⁴⁹ The vast majority of these programs are primarily aimed at providing nutritional assistance to women and children, a mere segment of the population facing food insecurity. Generally speaking, these programs require an application and put the onus on those experiencing food insecurity and hunger to apply for those services. Of the 12.7% of food insecure homes, 59% participated in at least one of the three biggest food assistance programs: SNAP, WIC, and NSLP.⁵⁰ SNAP provides vouchers and coupon benefits to households that meet certain income requirements, which allow them to purchase food from participating retailers.⁵¹ WIC provides grants to states for purposes of organizing food distribution, healthcare referrals, and food vouchers.⁵² NSLP gives free or subsidized lunches to public and private school students whose families are below a certain income threshold.⁵³

Only two of the eight programs (TEFAP and CSFP) work to supply food banks and shelters.⁵⁴ All other food bank and emergency stores are provided by non-governmental organizations (NGOs), private charities, and private donations.⁵⁵ This places a heavy burden on private organizations and individuals to act as gap fillers in the face of inadequate food supply.⁵⁶ These organizations have risen to the challenge—there are food banks in all fifty states that are predominantly sustained on private donations.⁵⁷ Second Harvest, the nation's largest food bank, works specifically with citizens who have limited access to other federal food assistance programs.⁵⁸ While the work these organizations do in gap filling is undoubtedly necessary, in her article for the *Seattle Journal of Social Justice*, Jessica Cohen postulates that reliance on these charity donations and NGOs and the promotion of individual giving takes away governmental incentives to continue to help or add more programming that is still desperately needed.⁵⁹

In addition to these services available at the request of individuals in need, the United States passed the Bill Emerson Good Samaritan Food Donation Act (GSA) in 1996.⁶⁰ At the time this Act was passed, the food insecurity rate was reported to be roughly 12%⁶¹ of the population, or just under the current measurement.⁶² The Act was put forward to encourage retailers and individuals to donate grocery items to food pantries and preempt state liability laws in the event of potentially spoiled

49 *Federal Food Assistance Programs*, FEEDING AM., <http://www.feedingamerica.org/take-action/advocate/federal-hunger-relief-programs/> (last visited Jan. 13, 2017).

50 *Id.*

51 Cohen, *supra* note 24, at 463.

52 *Id.*

53 *Id.*

54 *See Federal Food Assistance Programs*, *supra* note 46.

55 Cohen, *supra* note 24, at 464.

56 *Id.* at 463–64.

57 *Id.* at 464.

58 *Id.*

59 *Id.* at 465.

60 Haley, *supra* note 33, at 1449.

61 *See* Cohen, *supra* note 24, at 458.

62 *Food Security Status of U.S. Households in 2016: Key Statistics and Graphics*, USDA, <https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/key-statistics-graphics.aspx> (last visited Jan. 14, 2017).

donations; the GSA sets gross negligence as the liability floor for donors.⁶³ This liability floor in essence allows donors to give food deemed “apparently fit”—that is, “meet[ing] all quality and labeling standards imposed by Federal, State, and local laws and regulations, even though the product may not be readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions”⁶⁴—to food pantries without fear of liability for injury, as long as the food was given in good faith. In enacting this bill, lawmakers hoped to assuage any fears that may have been overriding willingness to donate for both individuals and corporations.⁶⁵ This Act, through its passive encouragement, essentially seeks to combat food insecurity by reducing food waste.⁶⁶

The GSA’s strides towards achieving its intended effect have been insignificant at best. According to Second Harvest, companies donating goods request that Second Harvest “strip their products of [the company’s] logo and re-label [the items].”⁶⁷ Cohen suggests that perhaps the GSA has decreased fears about liability but not about bad press—donating inferior goods that lead to injury may no longer lead to liability, but the GSA does not do enough to eradicate the fear of potential public backlash.⁶⁸ After its enactment, the GSA has essentially served no real purpose except to serve as a hollow symbol of governmental response to the nation’s food insecurity crisis; “[t]he Act simply eases what should be the federal government’s responsibility to alleviate the nation’s hunger by passing on that duty to NGOs and the private sector.”⁶⁹

On the surface, eight assistance programs and one act seem to demonstrate the government’s desire to ease the burden on food-insecure individuals. In reality, only three of those programs see much use at all, and the GSA is an act in name only. Perhaps most disheartening of all is the nature of trade-off politics that plague the creation, implementation, and successes of alternative solutions. When the GSA passed, SNAP (called food stamps, at the time) lost \$28 billion in funding.⁷⁰ In the five years preceding the passage of the GSA, the USDA committee for TEFAP decreased food purchase appropriations by nearly \$100 million.⁷¹ Other times, a shift in a certain demographic around which governmental programing is created gives reason to alter related programs; the improvement of poverty rates in the mid-’90s was accompanied by a decrease in governmental emergency food programs.⁷²

63 Haley, *supra* note 33, at 1455.

64 42 U.S.C. § 1791(b)(1) (2012).

65 See Haley, *supra* note 33, at 1455.

66 See *id.* at 1456 (noting that liability concerns were the reason why “unsalable, but otherwise wholesome, food is destroyed rather than donated to charity.”).

67 Cohen, *supra* note 24, at 476.

68 See *id.* at 477.

69 *Id.* at 478.

70 *Id.*

71 *Id.* at 461–62.

72 *Id.* at 461 (“For example, between 1995 and 2000, as the poverty rate in New York City dropped by 25 percent and many people moved into the workforce, the government moved people off of food stamp programs . . . [W]hile the economic boom combined with welfare reform moved many people out of poverty and into the workforce, literally hundreds of thousands of people were removed from food

Ultimately these measures, while developed with the intent to help American citizens in need, have not accomplished nearly enough. Assistance programs require those in need to work their way through a complex and bureaucratic system to get the relief they so desperately need. Generally, food-insecure individuals are also resource poor; many needing assistance lack formal education, do not have access to affordable childcare, and often work long or undesirable hours, each of which is a factor that works against their ability to push through these backlogged systems in a timely manner.⁷³ The GSA, formed with only the best intentions, is in practice not much more than a license for donors to continue to give (or not give) without fear of liability. Companies have little incentive to engage in donation and face no repercussions should they choose to waste otherwise usable resources.⁷⁴ There are significant barriers to achieving food security and more needs to be done to lower and eradicate these barriers.

III. THE FRENCH SOLUTION

As previously mentioned, one salient way to fight food insecurity is to fight food waste. Reducing or eradicating the wasting of consumable food is arguably a logical first step; there is no need to produce more when there is already an abundance.⁷⁵ Instead, reliably rerouting the spillover should make a fairly large dent in the number of individuals experiencing food insecurity. In fact, in April 2015, French lawmakers released a report containing thirty-six proposals for a national policy against food waste for just this purpose.⁷⁶ These proposals were the results of a wave of public support for measures against food waste: Arash Derambarsh, a municipal councilor in a Parisian suburb and the originator of this proposed law, began the process with an online petition calling for waste repercussions,⁷⁷ which received “more than 211,000 signatures in France and 740,000 in Europe.”⁷⁸ The law⁷⁹ was passed unanimously as a part of an omnibus green energy bill in February 2016, including

stamp programs and/or public assistance, leaving many to fall deeper into poverty. Many of these employed people were forced to turn to soup kitchens and food pantries for the first time.”).

73 See Crystal Weedal FitzSimons, James D. Weill, & Lynn Parker, *Barriers that Prevent Low-Income People from Gaining Access to Food and Nutrition Programs*, CONG. HUNGER CENTER (Mar. 31, 2004), <https://www.hungercenter.org/publications/barriers-to-food-and-nutrition-programs-frac/> (last visited Jan. 7, 2018).

74 Cohen, *supra* note 24, at 481.

75 See Chilton & Rabinowich, *supra* note 2, at 14.

76 Marie Mourad, NAT'L RESOURCE DEF. COUNCIL, *France Moves Toward a National Policy Against Food Waste*, 3 (2015).

77 Elizabeth Bryant, *France Battles Food Waste by Law*, DW (Apr. 19, 2016), <http://www.dw.com/en/france-battles-food-waste-by-law/a-19148931> (last visited Jan. 13, 2017).

78 Kim Willsher, *French MPs Vote to Force Supermarkets to Give Away Unsold Food*, THE GUARDIAN (Dec. 10, 2015, 8:35 AM), <https://www.theguardian.com/world/2015/dec/10/france-vote-force-supermarkets-give-away-unsold-food-waste> (last visited Jan. 7, 2018).

79 Loi n° 2016-138 du 11 février 2016.

two proposals aimed specifically at grocers and supermarkets.⁸⁰ The first requires grocery stores to work with an approved charitable organization in setting up donation agreements, and the second bans the practice of destroying surplus edible food.⁸¹

This law mandates “that all unsold but edible food should be donated to charities for immediate distribution . . . [and] [f]ood that is unsafe to eat is to be donated to farms for agricultural purposes.”⁸² Compliance with this law requires that supermarkets of a certain size enter into agreements with charities to set up donation procedures, and failure to comply results in monetary fines (estimated up to \$82,600) or two years in prison.⁸³ Because the law went into effect in early 2016, at the time of this writing, there is not much reporting data available that deals in the concrete effects of this program on France’s food insecure population. However, these statistics provided to *The Guardian* by Jacques Baillet, the head of a network of French food banks, speak to the potential impact this bill could have: “French food banks received 100,000 tonnes of donated goods, 35,000 tonnes of which came from supermarkets. Even a 15% increase in food coming from supermarkets would mean 10 m[illion] more meals being handed out each year”⁸⁴ If 35% of donations were already made by French supermarkets of their own volition, a law demanding that all supermarkets of a certain size donate should see a considerable increase in the amount of food reaching these food banks—in other words, the 15% hypothetical increase suggested by Baillet is not necessarily an exaggerated or overly optimistic goal.

The bill passed by the French Parliament addresses the issue of food waste as well as its complementary relationship to food insecurity by not only requiring donation but also prohibiting the practice of surplus food bleaching.⁸⁵ Some supermarkets, in an effort to discourage foraging through trash bins, intentionally destroyed surplus food (some thrown out before the expiry date) by dousing the food with bleach.⁸⁶ Donation coupled with the illegality of destroying edible products will necessarily mean a positive nutritional change for those experiencing hunger.⁸⁷ A wider variety of foods will be donated—most notably perishable items like fresh produce. Because of the nature of donations and potential legal liability, these types

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- 80 Marie Laroche, *The Aftermath of the French Legislation on Food Waste – 26 May 2015*, EU FUSIONS (May 26, 2015), <https://www.eu-fusions.org/index.php/sii-france/37-uncat/232-the-aftermath-of-the-french-legislation-on-food-waste-26-may-2015>; Willa Frej, *It’s Now Illegal for Supermarkets to Waste Food in France*, HUFFINGTON POST (Feb. 2, 2016, 12:31 PM), http://www.huffingtonpost.com/entry/france-supermarkets-food-waste_us_56b4ba4de4b04f9b57d93f53.
- 81 Angelique Chrisafis, *French Law Forbids Food Waste by Supermarkets*, THE GUARDIAN (Feb. 4, 2016, 11:03 AM), <https://www.theguardian.com/world/2016/feb/04/french-law-forbids-food-waste-by-supermarkets>.
- 82 Edward Delman, *Should It Be Illegal for Supermarkets to Waste Food?*, THE ATLANTIC (May 29, 2015), <http://www.theatlantic.com/international/archive/2015/05/law-france-supermarkets-food-waste/394481/>.
- 83 Eliza Collins, *France Food Waste Law Comes With Fines and Prison Time*, POLITICO (May 22, 2015, 8:51 PM), <http://www.politico.eu/article/france-food-waste-law-comes-with-fines-and-prison-time/>.
- 84 Chrisafis, *supra* note 81.
- 85 Mourad, *supra* note 76, at 6.
- 86 Chrisafis, *supra* note 81.
- 87 Delman, *supra* note 82.

of donations are lacking in nearly every food pantry setting.⁸⁸ By requiring that grocers donate food rather than destroy it, the French law effectively guarantees that better quality food will become available to France's food insecure population.

While some food banks poised to receive these surpluses are overjoyed,⁸⁹ others express reservations and concerns about accommodating the certain influx from grocery stores.⁹⁰ Aline Chassagnot, a Salvation Army manager, voiced reticence in the name of pragmatism: "[The Salvation Army] simply [does not] have to [sic] technical and logistical ability to distribute more food to more people."⁹¹ Certainly, this law will require logistical adjustments and strategizing. Coordinating deliveries, for instance, will presumably be resolved in the contracts between stores and donation centers, but questions remain of where and how this food (which, as mentioned, will include more fresh and perishable produce than before) will be stored and how it will be distributed. Additionally, there is an increased need for more volunteer labor to handle the added volume of goods.⁹²

Finally, it is important and noteworthy that the Act, in mandating that grocery stores and supermarkets of a certain size donate edible food to charity, is holding retailers most accountable for preventing food waste. While private citizens and production procedures also generate large amounts of food waste, it is grocers and supermarkets that are in the best position to make a major operational change that will have a significant impact on the amount of edible food going to waste in France.

IV. THE FRENCH SOLUTION AT WORK IN AMERICA

The idea of such pointed governmental interference with private businesses, compelling donations with threats of hefty fines or jail time, may cause the pulse of some American policymakers to falter and incite cries to protect the independence of businesses. Of more relevant concern is whether or not the required donation of unsold food is something that can and should be regulated by Congress. The policy considerations discussed throughout this Note illustrate the public need that would be served by such legislation if it were passed and provide persuasive arguments explaining why there is cause for such reform. The Commerce Clause is the mechanism through which Congress can address the issue of food waste by retailers and require the donation of unsold food items.

Congress's power under the Commerce Clause is considerable and far-reaching.⁹³ The Commerce Clause enables Congress to regulate channels, instrumentalities, and other (generally economic)⁹⁴ activities that substantially affect

88 Chrisafis, *supra* note 81.

89 *See Id.*

90 Bryant, *supra* note 77.

91 *Id.*

92 Chrisafis, *supra* note 81.

93 *See* U.S. CONST. art. I, § 8 ("Congress shall have power to . . . regulate commerce . . . among the several states.").

94 *United States v. Morrison*, 529 U.S. 598, 609 (2000); *Perez v. United States*, 402 U.S. 146, 150 (1971).

interstate commerce.⁹⁵ Beyond the scope of this power is the ability to regulate most non-economic activities and inactivity that result in a substantial effect on interstate commerce.⁹⁶ In requiring the donation of unsold, edible food by grocers in America, an act like the one passed in France approaches but does not cross the line of congressional power under the Commerce Clause.

Operating a grocery store is an economic venture that is clearly related to matters in interstate commerce. It is likely that most every item sold in a grocery store has gone through an interstate supply chain—goods produced in one state are often sold in the grocery stores of another. Congress may regulate “the use of the channels of interstate commerce”⁹⁷ and may regulate “and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce”⁹⁸ It is appropriate for Congress to mandate the donation of edible, unspoiled food by grocery stores, as that food clearly falls under two of the three possible categories of activity that the Commerce Clause allows Congress to regulate. Food sold at grocery stores is a “thing” in interstate commerce and has also been shipped using a channel of interstate commerce. Even if this position is rejected, the very nature of the retail food business is economic. This kind of business exists to make food available in enough supply to satisfy the nutritional demands of the American population. The third category of activity allows Congress to regulate economic activities that, when viewed in the aggregate, have a substantial effect on interstate commerce.⁹⁹ The country’s grocery and food retail industry seems to fall squarely within this third category.

Not only would an act similar to that passed in France be well within Congress’s power to enact, the use of the Commerce Clause to address the issue of food insecurity and waste is particularly appropriate from a social activism standpoint. Because the issues of food insecurity, poverty, crime, and education are all interrelated, a law like France’s not only addresses practical economic and health concerns, but also a number of the pervasive social issues discussed earlier in this Note. Congress has used the Commerce Clause in the past as a means of promoting social reform.¹⁰⁰ The Civil Rights Act of 1964 relied heavily on this clause. For example, Title II of the act invoked the Commerce Clause to prevent racial discrimination in places of public accommodation under the substantial economic effects test.¹⁰¹ In *United States v. Darby*, the Supreme Court upheld wage conditions

95 *United States v. Darby*, 312 U.S. 100, 103 (1941); *see also* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31; *Morrison*, 529 U.S. at 609.

96 *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 572 (2012) (suggesting that Congress cannot regulate non-economic inactivity).

97 *Morrison*, 529 U.S. at 609.

98 *Id.*

99 *See Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

100 David F. Forte, *Commerce, Commerce, Everywhere: The Uses and Abuses of the Commerce Clause*, HERITAGE FOUNDATION, at 4 (Jan. 18, 2011).

101 *See* Steven D. Schwinn, *Civil Rights Act of 1964: Enduring and Revolutionary*, INSIGHTS ON L. & SOC’Y (Winter 2014) (“Title II stated the ban on racial discrimination affirmatively, as a right of ‘all persons . . . to the full and equal enjoyment of goods, services, facilities, privileges, advantages, and

set by The Fair Labor Standards Act as permissibly reached by Congress through the Commerce Clause. In his opinion, Justice Stone specifically refers to the social motivation driving this act: “The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions”¹⁰²

Food insecurity is a social issue that can be addressed in part by reducing food waste at the retail level. In his article for *The Atlantic*, Edward Delman relies on the following National Resource Defense Council (NRDC) statistics to illustrate this point: “[a]bout one in seven Americans lacks reliable access to food, and an extra 15 percent in saved food could feed over 25 million Americans The retail sector in the United States accounts for approximately 10 percent of the available food supply, suggesting that a law similar to the one just passed in France could make a difference in reducing U.S. food insecurity.”¹⁰³ A significant reduction in food waste that results from changing the actions of a single sector in one uniform piece of legislation is the most efficient way to quickly address the issue of food insecurity. While food waste is highest at the individual consumer level—19% in the United States—¹⁰⁴ Congress would not be able to force private citizens to donate their excess food. In *National Federation of Independent Businesses v. Sebelius*, the Supreme Court recognized “Congress’s power to regulate ‘class[es] of activities’. . . not classes of *individuals*, apart from any activity in which they are engaged.”¹⁰⁵ If it required households to donate food already out of the stream of commerce, Congress would be regulating a “class whose commercial inactivity rather than activity is its defining feature,”¹⁰⁶ an exercise of power beyond the scope of the Commerce Clause.¹⁰⁷

Compelled donation is an appropriate action for Congress to take, should policymakers ever move to enact a law like French Parliament did. While the Good Samaritan Act was passed with the intention of encouraging additional private sector donations to NGO-run programs, it has had only a minor effect, at best, on reducing food waste.¹⁰⁸ Effectively, short of the direct government-to-consumer programs, the federal government seems to have washed its hands of the food insecurity issue facing the United States. A toothless measure like the GSA is simply not enough to overcome hesitance for businesses to donate and has not truly affected food security in any meaningful way. Mandating the donation of edible surplus food would result in the ability of the country to better cover the nutritional needs of the 42.2 million people estimated to be food insecure in 2015.¹⁰⁹ Finally, forced or compelled donation by food

accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, or national origin.”).

102 *Darby*, 312 U.S. 100, 115 (1941).

103 Delman, *supra* note 82.

104 Buzby & Hyman, *supra* note 17, at 564.

105 567 U.S. 519, 556 (2012) (citing *Gonzalez v. Raich*, 545 U.S. 1, 17 (2005)) (emphasis in original).

106 *Id.*

107 *See id.*

108 Cohen, *supra* note 24, at 478.

109 *Food Security Status of U.S. Households in 2016: Key Statistics and Graphics*, *supra* note 59.

retailers may also have a positive effect on individual consumption trends and behaviors. The food-retail sector and charitable food programs will necessarily need time to adjust to this new practice,¹¹⁰ and if the transition period is transparent, it may encourage private citizens to donate more readily than before.

CONCLUSION

Food insecurity in the United States is neither a new nor unconquerable issue. Americans discard 133 billion pounds of post-harvest, edible food annually.¹¹¹ An abundance of food becomes a shortage almost entirely through waste,¹¹² which fosters food insecurity in “households near or below the federal poverty line, households with children headed by single women or single men . . . and Black- and Hispanic-headed households” at a rate “substantially higher than the national average.”¹¹³ Food waste has a direct relationship with many environmental, economic, and social harms, and it is in the best interest of the citizens of this nation that these harms be mitigated through governmental action.

The United States has made some efforts to assuage the issues that accompany food insecurity. Various direct-to-consumer programs such as SNAP and WIC give some governmental assistance to low-income individuals with irregular access to food. The Bill Emerson Good Samaritan Food Donation Act of 1996 was a good-faith effort on the part of the American government to encourage donative practices by removing liability and contamination concerns for private businesses inclined to donate.¹¹⁴ Ultimately, however, this act has had little practical significance in shrinking the food insecure population.¹¹⁵

An act of legislation like the omnibus food waste law passed in France in 2016 may be the best example of an innovative solution to a national food waste epidemic. By requiring grocery stores and food retailers of a certain size to enter into agreements with charitable organizations, or else face fines and potentially jail time, the French law is taking concrete steps towards eradicating food insecurity among its citizens. The onus is placed on French food retailers to donate surplus stock, and they are prohibited from engaging in acts of unnecessary edible food destruction. Additionally, food not fit for human consumption will be reused or recycled in some

110 One year into its implementation, some issues with infrastructure development to meet the new burdens on charitable organizations receiving donations in France have been recognized. It is difficult to coordinate the storage and transportation of these goods, and similar issues are sure to arise in the United States should a similar law be enacted. Louis Gore-Langton, *France's Food Waste Ban: One Year On*, FOOD NAVIGATOR (Mar. 24, 2017), <http://www.foodnavigator.com/Policy/France-s-food-waste-ban-One-year-on>.

111 Harrison Jacobs, *Why Grocery Stores Like Trader Joe's Throw Out So Much Perfectly Good Food*, BUSINESS INSIDER (Oct. 15, 2014, 10:55 AM), <http://www.businessinsider.com/why-grocery-stores-throw-out-so-much-food-2014-10>.

112 See USDA & EPA, *supra* note 35.

113 COLEMAN-JENSEN ET AL., *supra* note 44.

114 See James Haley, *supra* note 33.

115 See Cohen, *supra* note 24, at 478.

way, ensuring that resources used in the production of all food were not needlessly squandered.¹¹⁶ The framework of this proposal is representative of a “food waste reduction hierarchy,” a plan detailed by a 1999 USDA report aimed at helping municipalities reduce food waste through donation.¹¹⁷ This hierarchical approach confronts the environmental, economic, and nutritional concerns associated with food waste and insecurity.

The United States Congress can regulate the disposal of surplus food through the powers bestowed upon it through the Commerce Clause and in so doing, would effectively address the national food insecurity crisis. The food sold in grocery stores and supermarkets nationwide is inextricably related to interstate commerce and is thereby suitable for Congress to regulate in a manner that best serves the interests of the American economy and people.

To engage in ineffective lawmaking related to fundamental human needs is to be passive to the plight of those in need; in this instance, inaction speaks volumes about the American government’s priorities and the populations that truly matter in the eyes of the law. It is shameful that basic tenets of food distribution and waste—governed by policies seemingly removed from racial or class considerations—serve to perpetuate the already glaring and gross inequities that non-majority citizens face on a daily basis. Adding one more barrier to achieving an equal starting place through ineffective legislation that governs such a basic need as food is nearly indistinguishable from other forms of systemic oppression. A nation producing enough food to feed its entire population, but whose distribution and disposal practices make food security impossible for all to attain, is a nation failing its citizens.

116 Mourad, *supra* note 76, at 5.

117 USDA & EPA, *supra* note 35 (suggesting “feeding people first, then animals, then recycling, then composting” as an effective measure to reducing waste).